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8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)	Criminal Case No. 08cr0303BEN
)	
11 Plaintiff,	)	DATE: June 16, 2008
	)	TIME: 2:00 p.m.
12 v.)	
	)	UNITED STATES' RESPONSE AND
	)	OPPOSITION TO DEFENDANT'S
13	)	MOTIONS TO:
14 GUADALUPE AISPURO,)	
	)	1) DISMISS INDICTMENT;
15 Defendant.	)	2) SUPPRESS EVIDENCE;
	)	3) SUPPRESS STATEMENTS;
16	)	4) COMPEL DISCOVERY; AND
17	)	5) FILE FURTHER MOTIONS.
)	
18	)	TOGETHER WITH UNITED STATES'
	)	MOTION FOR RECIPROCAL
19	)	DISCOVERY

20 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and
 21 through its counsel, Karen P. Hewitt, United States Attorney, and
 22 Carlos Arguello, Assistant United States Attorney, and hereby
 23 files its response and opposition to Defendant's above-referenced
 24 motions. This response is based upon the files and records of
 25 this case, together with the attached statement of facts,
 26 memorandum of points and authorities and the United States' motion
 27 for reciprocal discovery.
 28

I.

STATEMENT OF FACTSA. PRIMARY INSPECTION AT THE WESTMORLAND CHECKPOINT

On Wednesday, January 9, 2008, at approximately 3:20 a.m., Defendant Juan Alonso Rojo-Castaneda ("Defendant") drove a grey Kenworth tractor trailer bearing California license plates to the fully operational, United States Border Patrol checkpoint on Highway 86 in Westmorland, California. Defendant was hauling an approximately 53-foot semi-trailer. Defendant was the registered owner and sole occupant of the tractor trailer.

United States Border Patrol Agent Freddy Carretero was working at the primary inspection area at the checkpoint when Defendant's tractor trailer approached. The agent asked Defendant routine inspection questions. Defendant, age 32, stated he was a lawful permanent resident of the United States and presented his permanent resident alien card.

The agent then asked Defendant what type of cargo he was transporting. Defendant responded that the trailer was empty and that he was driving to Bakersfield. During this brief questioning, Agent Carretero observed that Defendant appeared extremely nervous. The agent noticed that Defendant seemed fidgety, avoided eye contact, appeared eager to answer questions, and asked to be allowed to continue on his way.

While Agent Carretero spoke with Defendant at the primary area, Border Patrol Agent Vega, a canine handler, was working in the pre-primary inspection area at the checkpoint with his assigned canine. Agent Vega noticed the tractor trailer and had his canine conduct a sniff of both the tractor trailer and semi-

1 trailer. His assigned canine Hoby alerted to the rear doors of
2 the semi-trailer. At this point, Agent Vega signaled to Agent
3 Carretero to refer Defendant and his truck to the secondary
4 inspection area. As a result, Defendant was referred to the
5 secondary location.

6 **B. SECONDARY INSPECTION AT THE CHECKPOINT**

7 In the secondary inspection area, Agent Vega approached
8 Defendant and asked him what he had in the semi-trailer.
9 Defendant replied that it was empty. Agent Vega then asked
10 Defendant if he would consent to a search of the semi-trailer.
11 Defendant consented to a search and opened the rear doors of the
12 semi-trailer. Agent Vega looked inside the semi-trailer and saw
13 several plastic crates double-stacked together. Within moments,
14 the canine alerted to the crates.

15 Border Patrol agents eventually removed eighteen (18) bales
16 of packages from within two crates located at the front end of the
17 semi-trailer. The contents of one of the bales field-tested
18 positive for marijuana. The gross weight of all the packages was
19 168 kilograms or 369 pounds. Agents subsequently placed Defendant
20 under arrest for the illegal possession of narcotics.

21 **C. DEFENDANT'S POST-ARREST STATEMENTS**

22 United States Drug Enforcement Administration Special Agent
23 Richard Slattery and Task Force Officer Pompeyo Tabarez assumed
24 the investigation of this case. Officer Tabarez advised Defendant
25 of his Miranda rights in the Spanish language with Special Agent
26 Slattery serving as a witness. Defendant stated he understood his
27 rights and agreed to speak with the agents.

28

1 Defendant denied knowledge of the marijuana found in his
2 semi-trailer. Defendant confirmed he owned the tractor trailer.
3 He told the agents that he worked for Juarez Brothers Trucking in
4 Bakersfield, California. He gave the name of David Hernandez as
5 the dispatcher. Defendant claimed that on January 8, 2008, the
6 day before his arrest, he delivered a load of carrots from
7 Grimmway Farms in Bakersfield to the El Centro Cold Storage
8 warehouse in El Centro, California.

9 Defendant stated that his semi-trailer was unloaded at the
10 storage warehouse at approximately 11:45 p.m. Thereafter, a
11 forklift operator named "El Gordo" loaded his semi-trailer with
12 empty plastic bins. Defendant remained inside the tractor trailer
13 during that time and could not see "El Gordo" loading his trailer.

14 After leaving the storage warehouse, Defendant drove his
15 tractor trailer to Westmorland. Defendant claimed he intended to
16 drive north to Bakersfield in order to deliver the plastic bins to
17 Grimmway Farms. Defendant drove a distance, took a short nap, and
18 then proceeded to the Westmorland checkpoint.

19 **D. FOLLOW-UP INVESTIGATION**

20 Special Agent Slattery conducted follow-up investigation
21 based on Defendant's statements. He did the following:

- 22 1. Agent Slattery spoke with Richard Hiura, Director of
23 Processing and Packaging for River Ranch Fresh Foods in
24 El Centro, California. Mr. Hiura confirmed that River
25 Ranch received a shipment of carrots from Grimmway Farms
26 but it was on January 9, 2008, and the shipment arrived
27 at approximately 11:15 a.m. He stated shipments of
28 carrots only arrive in the morning hours and not in the

1 evening. Mr. Hiura also added no such person by the
2 name of "El Gordo" worked at their facility.

3 2. Agent Slattery obtained a bill of lading from River
4 Ranch Fresh Foods which stated that the January 9, 2008
5 shipment of carrots was delivered by a driver named
6 Gilbert Ramos and not Defendant.

7 3. Agent Slattery was informed by River Ranch
8 representatives that they do not load bins into trailers
9 as described by Defendant. Moreover, River Ranch uses
10 its own semi-trailers to transport carrots, not the
11 personal trailers of the drivers.

12 4. Agent Slattery spoke with David Hernandez, a dispatcher
13 employed by Juarez Brothers Trucking in Bakersfield,
14 California. Mr. Hernandez verified Defendant worked for
15 them but had not made any deliveries for them since
16 November 2007.

17 **E. THE INDICTMENT**

18 On February 6, 2008, a grand jury returned an indictment
19 against Defendant charging him with one count of possessing 100
20 kilograms or more of marijuana with intent to distribute in
21 violation of Title 21, United States Code, Section 841(a)(1).

22 **II.**

23 **POINTS AND AUTHORITIES**

24 **A. THE GRAND JURY INSTRUCTIONS WERE LEGALLY PERMISSIBLE,**
25 **AND THE INDICTMENT SHOULD NOT BE DISMISSED**

26 Defendant moves to dismiss the indictment based on the
27 instructions give to the Grand Jury. Defendant's briefing is
28 identical in all relevant aspects to the briefing submitted in

1 United States v. Martinez-Covarrubias, Case No. 07CR0491-BTM, and
2 United States v. Jimenez-Bermudez, 07CR1372-JAH. Accordingly, the
3 Government explicitly incorporates by reference the briefing on
4 this issue that was filed in Martinez-Covarrubias and Jimenez-
5 Bermudez.

6 This motion has been denied by each court that has considered
7 it, and should also be denied in this case. If the Court would
8 like further briefing on this issue, the Government would request
9 leave to file a supplemental brief.

10 **B. THE SEARCH OF DEFENDANT'S SEMI-TRAILER WAS REASONABLE**

11 **1. Defendant's Referral to Secondary Inspection was Lawful**

12 The Supreme Court has held that a car may be stopped at a
13 permanent checkpoint for brief immigration inspections and the car
14 and occupants referred to secondary for further questioning
15 without "any individualized suspicion." United States v.
16 Martinez-Fuerte, 428 U.S. 543, 562 (1976); United States v.
17 Barnett, 935 F.2d 178, 180-82 (9th Cir. 1991).

18 Further, in United States v. Taylor, 934 F.2d 218, 220 (9th
19 Cir. 1991), the Ninth Circuit held that where inspection at a
20 Border Patrol checkpoint established the motorist's identity and
21 lawful status, *absent probable cause or consent*, some minimal,
22 articulable suspicion is necessary to justify a brief, further
23 delay for a dog sniff. Taylor, 934 F.2d at 221. Nonetheless, a
24 unanimous panel found that the Border Patrol agent's observation
25 that the motorist "became increasingly nervous and uneasy at the
26 end of the initial check for aliens constituted minimal,
27 articulable suspicion and therefore justified the brief further
28 delay." Id.; see also United States v. Preciado-Robles, 964 F.2d

1 882, 884 (9th Cir. 1992) (brief detention following valid
2 immigration questioning was permissible where defendants were
3 "visibly nervous" during questioning).

4 While the agents did not need individualized suspicion to
5 refer Defendant to secondary inspection, the fact that the
6 narcotics canine alerted to the semi-trailer while it was at the
7 primary inspection area and the fact Defendant appeared extremely
8 nervous and eager to continue on his trip certainly provided such
9 suspicion.

10 **2. Probable Cause Supported the Search of the Semi-Trailer**

11 A search at a checkpoint must be justified by probable cause
12 or consent. Martinez-Fuerte, 428 U.S. at 567. In the instant
13 case, the certified detector dog alerted to defendant's truck at
14 pre-primary inspection. The use of a detector dog to conduct a
15 "sniff" of a vehicle is not a search which requires either
16 probable cause or consent. See United States v. Place, 462 U.S.
17 696, 707 (1983); see also United States v. Lingenfelter, 997 F.2d
18 632, 638 (9th Cir. 1993). ("(C)onsent is not required for a dog
19 sniff of a lawfully detained vehicle".)

20 The question of whether there is probable cause to conduct a
21 search of a vehicle requires determining "whether the known facts
22 and circumstances are sufficient to warrant a man of reasonable
23 prudence in the belief that contraband or evidence of a crime will
24 be found." United States v. Ornelas, 517 U.S. 690, 696 (1996).

25 Here, probable cause existed to justify the search of
26 Defendant's truck.

27 Primarily, a certified detector dog alerted twice to the
28 cargo area of the truck. A canine sniff alone can constitute

1 probable cause if the reliability of the dog is established.
2 Lingenfelter, 997 F.2d at 639; ("A canine sniff alone can supply
3 the probable cause necessary for issuing a search warrant if the
4 application for the warrant establishes the dog's reliability.");
5 Dovali-Avila, 895 F.2d at 207 ("a 'dog alert' is sufficient to
6 create probable cause to conduct a warrantless vehicle search.");
7 Massie 65 F.3d at 849 (dog alert on suitcase and trunk of vehicle
8 at Border Patrol checkpoint afforded probable cause for the
9 search).

10 Secondarily, the facts Defendant appeared extremely nervous
11 and was traveling northbound on a route commonly traveled by those
12 involved in both drug and alien smuggling near the U.S./Mexican
13 border can be taken into consideration by agents.

14 **3. Defendant Consented to the Search of His Semi-Trailer**

15 A search conducted pursuant to valid consent constitutes a
16 well recognized exception to both the warrant and probable cause
17 requirements of the Fourth Amendment. See Schneckloth v.
18 Bustamonte, 412 U.S. 218 (1973). A search based on consent allows
19 any evidence discovered during that search to be admitted,
20 provided that the consent is freely given.

21 As the Court recognized in Schneckloth v. Bustamonte, the
22 question "whether a consent to search was in fact 'voluntary' or
23 was the product of duress or coercion, express or implied, is a
24 question of fact to be determined from the totality of all the
25 circumstances." Under this totality of circumstances approach,
26 courts generally find a lack of consent only where there has been
27 a finding that explicit or implicit coercion was brought to bear
28 on the consenting party. See Schneckloth v. Bustamonte, 412 U.S.

1 at 228.

2 Here, agents asked for and received consent to search the
3 semi-trailer. The Ninth Circuit, in approving a consent search at
4 the San Clemente, California checkpoint, has squarely held that
5 "valid consent may be given while detained." United States v.
6 Ramirez-Jiminez, 967 F.2d 1321, 1324 (9th Cir. 1992).

7 Additionally, agents need no level of suspicion to ask for
8 Defendant's consent. See United States v. Taylor, 934 F.2d 218,
9 220 (9th Cir. 1991); see also Martinez-Fuerte, 428 U.S. at 567
10 ("Checkpoint searches are constitutional only if justified by
11 consent or probable cause to search") (emphasis added).

12 **C. DEFENDANT'S STATEMENTS ARE ADMISSIBLE**

13 **1. Defendant's Waiver Of Rights Was**
14 **Knowing, Voluntary, And Intelligent**

15 Defendant's statements were voluntary and made after he was
16 advised of his Miranda rights and waived them. Before the
17 interview began, Defendant was read his Miranda rights in Spanish
18 from an advice of rights form. After stating that he understood
19 his rights, Defendant waived his rights and agreed to be
20 interviewed without an attorney present.

21 It is uncontested that custodial interrogation designed to
22 elicit incriminating statements must be preceded by explicit
23 procedural safeguards. Miranda v. Arizona, 384 U.S. 436 (1966).
24 Whether there has been an intelligent Miranda waiver by Defendant
25 depends upon the particular facts in the case, including the
26 background, experience, and conduct of the accused. Brewer v.
27 Williams, 430 U.S. 387, 403 (1977); United States v. Rodriguez-
28 Gastelum, 569 F.2d 482, 483 (9th Cir.) cert. denied, 436 U.S. 919

1 (1978).

2 Statements taken in violation of the Miranda safeguards are
3 ordinarily inadmissible. See United States v. Heldt, 745 F.2d
4 1275 (9th Cir. 1984). The burden is on the Government to
5 establish voluntariness by a preponderance of the evidence. Lego
6 v. Twomey, 404 U.S. 477, 488-489 (1972).

7 While it is true that this burden rests on the Government,
8 the Court must still consider what effect the actions of the
9 Government agents had upon a defendant. The focus of the inquiry
10 is on the defendant's state of mind. See Title 18, United States
11 Code, Section 3501(b). Therefore, the Court should consider
12 defendant's testimony, or his failure to give it, before deciding
13 this issue.

14 A statement is considered voluntary if the totality of the
15 surrounding circumstances indicates that it was the product of
16 free and rational choice. Culombe v. Connecticut, 367 U.S. 568,
17 602 (1961). The voluntariness of a Fifth Amendment waiver depends
18 "on the absence of police overreaching, not on 'free choice' in
19 any broader sense of the word." Colorado v. Connelly, 479 U.S.
20 157, 170 (1986). In examining the totality of the circumstances,
21 the Court must examine the personal characteristics of defendant
22 together with the details of the interrogation. See Schneckloth
23 v. Bustamonte, 412 U.S. 218, 226 (1973). Relevant personal
24 characteristics of defendant include his age, intelligence,
25 educational level, knowledge of rights, as well as his physical,
26 mental, or emotional condition. See Brewer v. Williams, 430 U.S.
27 387, 403 (1977).

1 The testimony would establish that Defendant was not
2 subjected to outrageous conduct such as physical intimidation,
3 torture, coercion, or threats. Rather, Defendant had his Miranda
4 rights properly read to him in his native language. Thereafter,
5 Defendant acknowledged and waived his rights.

6 The Government's conduct was entirely proper and this Court
7 should not suppress any statements made by Defendant.

8 **D. COMPEL DISCOVERY**

9 The Government has produced approximately fifty-five (55)
10 pages of discovery. Additional discovery will be produced as it
11 is available. At this time, the Government is awaiting a
12 laboratory analysis report from the Drug Enforcement
13 Administration, Department of Motor Vehicle documents, photographs
14 taken on the day of arrest, cellular phone records, and further
15 Immigration and Customs Enforcement reports which will be provided
16 to Defendant once they have been received.

17 The discovery produced is in excess of that required by Rule
18 16 of the Federal Rules of Criminal Procedure and the Jencks Act
19 (now covered by Rule 26.2 of the Federal Rules of Criminal
20 Procedure). As to the physical evidence, the Government will make
21 it available for viewing by defense counsel at a mutually
22 convenient time and place.

23 As to exculpatory information, the Government is well aware
24 of its obligation under Brady v. Maryland, 373 U.S. 83 (1963) and
25 will comply.

26 The Government will provide a list of witnesses in its trial
27 memorandum. The grand jury transcript of any person who will
28 testify at trial will also be produced.

1 The Government has provided and will continue to provide
2 information within its possession or control pertaining to the
3 prior criminal history of the Defendant. Evidence of other acts
4 or crimes by the Defendant similar to this marijuana possession
5 case will be provided. The Government intends to seek permission
6 to introduce this evidence under Fed. R. Evid. 404(b) at trial and
7 hereby formally provides written notice to Defendant. The
8 Government also intends to seek permission to impeach Defendant
9 with any felony conviction he may have under Fed. R. Evid.
10 609(a)(1) if he testifies at trial.

11 The Government will produce the reports of any experts that
12 it intends to use in its case-in-chief at trial or are material to
13 the preparation of the defense.

14 In view of the above-stated position of the Government
15 concerning discovery, it is respectfully requested that no orders
16 compelling specific discovery by the Government be made at this
17 time. The Government also respectfully requests reciprocal
18 discovery of the Defendant. If and when individual problems arise
19 which cannot be resolved between counsel for Defendant and the
20 Government, the matters can be submitted to the Court for
21 decision.

22 **E. FILE FURTHER MOTIONS**

23 The Government does not oppose Defendant's request to file
24 further motions if based on newly acquired discovery.

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III.

A. UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY

The United States hereby requests Defendants to deliver all materials to which the United States may be entitled under Federal Rules of Criminal Procedure 16(b) and 26.2.

IV.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Defendant's motions be denied where opposed, and that its motion for reciprocal discovery be granted.

DATED: June 10, 2008.

Respectfully submitted,

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United States Attorney

s/ Carlos Arguello

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